

United States Senate

WASHINGTON, DC 20510

October 23, 2006

Received 10/23/06
MSHA/OSRV

The Honorable Elaine Chao
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Criteria and Procedures for proposed Assessment of Civil Penalties, RIN 1219-AB51

Dear Secretary Chao:

We write to comment on the Department of Labor's proposed regulation to revise the procedure for determining penalties under our mine health and safety laws.

The Mine Improvement and New Emergency Response (MINER) Act of 2006 was enacted into law as a direct response to the tragic and preventable accidents at the Sago and Alma mines. These were not isolated incidents. Indeed, we are seeing record-high deaths in the mining industry, with sixty-five miners killed on the job already this year. A critical part of reversing this trend must be rigorous enforcement of the law to ensure that mining companies eliminate hazards that endanger miners' lives.

Under the MINER Act, Congress explicitly directed the Mine Safety and Health Administration (MSHA) to issue revised penalties regulations by December 2006. Our intent was to draw on the agency's extensive expertise and data concerning safety violations to create a strengthened and targeted penalties regime. Existing standards have permitted many mine operators to escape the consequences for serious health and safety violations, and we commend the agency for tackling this vital issue.

We are concerned, however, that the proposed regulations, as drafted, could in some cases weaken penalties, particularly for repeat violations. In other instances, MSHA has not provided sufficiently detailed justification for its proposals. The draft provides scant empirical support and no case studies as to how these new penalties would apply to real-life scenarios. We understand that at public hearings, MSHA has requested the regulated community to provide data on these issues; we strongly believe that the agency has a responsibility to provide a transparent means for all parties to evaluate these proposed changes.

We therefore urge you to take into consideration the following concerns.

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First and foremost, we are concerned that the revised schedule set forth by MSHA imposes lower penalties than under current regulations. For example, under existing law, an infraction that receives 50 points would receive a fine of \$878 dollars; under the proposed regulations, the same infraction would receive a fine of only \$112. The effect is exacerbated further up the scale: an infraction receiving 70 points under current law would receive a penalty of \$6,071, but under the proposed regulations, only \$249. The proposed regulations would increase the number of points awarded in some situations, but in many cases the points would not increase significantly, which means these safety violations would receive substantially reduced penalties under this regime.

For example, many of the point-schedule increases are based on the size of the mine in question. As a result, the new schedule would likely result in a significant decrease in penalties on small operators. Our mine safety laws state that the size of a mine is a factor to be taken into account, and smaller mines pose unique hazards. Indeed, MSHA's Small Mines Division focuses on just such problems. MSHA has not adequately demonstrated why smaller mines will see significant penalty reductions under its proposed regime and it certainly has not demonstrated how such reductions would benefit miners. The life of every miner is valuable, and we must not place a lesser value on protecting miners at smaller operations.

Any enforcement regime must also focus on companies that pose the most serious threats to worker safety. Companies with a history of violations need stronger deterrents, as MSHA has repeatedly acknowledged. Yet the proposed regulations appear to weaken the agency's ability to meet this concern. For example, proposed section 100.3(c) would shorten the period for repeat offenses reviewed by the Secretary from 24 months to 15 months, which would exclude critical information about a company's past safety record, and could result in lower penalties for repeat violators. If this rule had been applied to Sago Mine, over fifty violations before the January 2006 disaster would have been disregarded. Keeping the 24-month review period would give regulators a more complete picture of an operator's safety record; it would also provide additional incentives for operators to maintain safe conditions over time in their mines.

We are also concerned that proposed section 100.3(p)(2) too narrowly construes repeat violations—an operator must commit the identical violation for it to be considered a repeat violation that incurs increased penalties. The agency should not allow minor differences to obscure the larger picture of a negative safety record. We suggest that the regulations adopt broader categories of citations in determining whether a company is a repeated safety violator.

Egregious safety violations deserve a proportionate response. Under current regulations, serious violations—such as operators who continue operations in the face of a mine closure order or those who refuse to permit MSHA representatives to inspect their mines—warrant special assessments. Yet MSHA is proposing to eliminate the special assessment categories (section 100.5(a)). The only explanation is that enforcement of these categories is unduly burdensome. We understand the need to reduce administrative burdens, but we strongly believe that any final regulation must levy heavy penalties on blatant violations and operators who flout the law. In addition, we believe eliminating these categories creates confusion for companies, by eliminating certainty about when they will be subject to special assessments. For this reason, we believe the special assessment standards should be retained.

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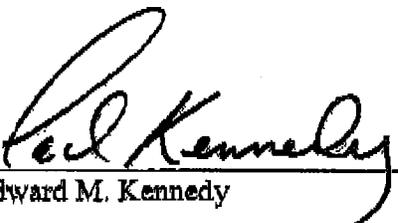
Identifying violations and imposing penalties are only initial steps. The agency should also follow through to ensure that companies quickly address unsafe working conditions. Yet MSHA proposes to eliminate provisions that assess more points when operators fail to timely abate violations. We do not understand the reasoning for this decision. Failure to timely address workplace dangers should lead to higher penalties. MSHA has other tools available, but the agency should retain every option to enforce the law effectively.

In addition, we urge the agency to clarify that when operators fail to abate violations, the agency's response will be swift and substantial, and will include actions such as immediate suspension of mining operations. The proposed regulations should adopt similar steps when operators refuse to pay assessed penalties. It is within the Secretary's authority to pursue such operators aggressively, and MSHA should do so. If MSHA believes that it has insufficient authority to do this, we would welcome specific legislative proposals from the agency to strengthen your ability to enforce the law.

Finally, there are a number of instances which warrant further clarification in the final regulations. For example, MSHA proposes the elimination of single penalty assessments. We understand the agency does not intend to eliminate penalties for such violations, but rather to address all penalties through the point-based system enumerated in the regulations. If this is the case, any final regulations should clearly state that this will be MSHA's new approach. We also encourage the agency to offer a more detailed statement of purpose for the proposal to eliminate single penalty assessments that includes empirical data and projections for this shift. As another example, while we commend the agency's interest in factoring in the size of controlling entities of mines that commit safety violations, mines can change ownership many times in a short period of time. In this respect, the proposed regulation is short on details. MSHA should clarify precisely how information on controlling entity size will be collected and maintained so that it adds to, rather than detracts from, an efficient and transparent penalty process.

We appreciate the chance to comment on these regulations, and we look forward to working with you to strengthen our mine safety laws and regulations, and to protect the lives of our nation's miners.

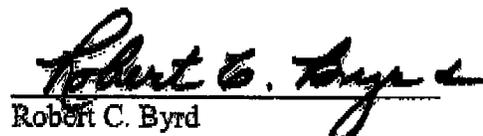
Sincerely,


Edward M. Kennedy


Arlen Specter


Patty Murray


John D. Rockefeller IV


Robert C. Byrd

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cc: Richard Stickler, Assistant Secretary of Labor for Mine Safety and Health, MSHA
Patricia W. Silvey, Acting Director, Office of Standards, Regulations and Variances, MSHA